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No. 88-1948

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THOMAS J. LIPTON, INC., and KRAFT, INC.,
Petitioners,

v.

R.C. BIGELOW, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

RICHARD J. WERTHEIMER *
JAMES R. JACKSON, JR.
ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-6824
Attorneys for Petitioner Lipton

TEFFT W. SMITH
DANIEL F. ATTRIDGE
KIRKLAND & ELLIS
200 East Randolph Street
Chicago, Illinois 60601
(312) 861-2212
Attorneys for Petitioner Kraft

* Counsel of Record

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Petitioners Thomas J. Lipton, Inc. ("Lipton") and Kraft, Inc. ("Kraft") respectfully submit this reply brief in support of their petition for a writ of certiorari ("Petition").

1. *Atlantic Richfield.* On June 5, 1989, the day the Petition was filed, the Court granted certiorari in *U.S.A. Petroleum Co.* v. *Atlantic Richfield Company*, 859 F.2d 687 (9th Cir. 1988), *cert. granted*, 57 U.S.L.W. 3789 (U.S. June 6, 1989) (No. 88-1668).

Atlantic Richfield presents the question whether, under Section 4 of the Clayton Act, 15 U.S.C. § 15, antitrust injury to a competitor may be presumed solely from evidence relating to the alleged substantive antitrust viola-

tion. Our Petition presents precisely the same question under Section 16 of the Clayton Act, 15 U.S.C. § 26.[1]

Section 4 and Section 16 are parallel provisions. Section 4 affords standing to seek treble damages to a "person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. . . ." Section 16 affords standing to seek injunctive relief to a "person . . . threatened [with] loss or damage by a violation of the antitrust laws . . ." In *Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104, 113 (1986), the Court recognized that "Sections 4 and 16 are thus best understood as providing complementary remedies for a single set of injuries."

The Second Circuit here, and the Ninth Circuit in *Atlantic Richfield*, ignored the threshold antitrust injury requirement and held that proof relating to the substantive antitrust claim permits a presumption of antitrust injury. Such holdings are consistent with the dissent in *Cargill*, but wholly inconsistent with the opinion for the Court.[2]

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[1] The procedural posture of this case and of *Atlantic Richfield* are also identical: in both cases, the appeal court reversed summary judgment granted by the district court to defendants because plaintiff lacked antitrust standing. It is well settled that review by this Court is appropriate at this point and need not await final judgment. *E.g., Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land* v. *Dollar*, 330 U.S. 731, 734 n.2 (1947).

[2] The Second Circuit roved farther afield than the Ninth Circuit. While the Ninth Circuit presumed antitrust injury in a vertical price fixing case, it conceded that in a merger case, *Cargill* requires proof of injury from predatory or otherwise illegal pricing. 859 F.2d at 694. The Second Circuit waived such proof of antitrust injury in a merger case. The Second Circuit's presumption—that a company with a high market share will engage in predatory practices—lacks any support in antitrust case law.

Predictably, the postmerger market share sufficient for a presumption of antitrust injury in the Second Circuit is falling rapidly. In *Remington Products, Inc.* v. *North American Phillips Corp.*, Civ.

In contrast, the Fifth and Seventh Circuits, in *Phototron Corp.* v. *Eastman Kodak Co.*, 842 F.2d 95 (5th Cir.), *cert. denied*, 108 S. Ct. 1996 (1988) and *Indiana Grocery, Inc.* v. *Super Valu Stores, Inc.*, 864 F.2d 1409 (7th Cir. 1989), have adhered to the Court's opinion in *Cargill* and have required a complaining competitor to prove as a threshold matter, and independent of the substantive antitrust violation, that the competitor has suffered or will suffer antitrust injury, as required by Sections 4 and 16.

We urge the Court to grant the Petition, consolidate this case for decision with *Atlantic Richfield*, and resolve this intercircuit conflict under these parallel provisions of the antitrust laws. Alternatively, we urge the Court to hold the Petition in abeyance pending the Court's decision in *Atlantic Richfield*.

2. *The Justiciable Case or Controversy.* Having successfully argued to the Second Circuit that this case is not moot, Respondent R. C. Bigelow, Inc. ("Bigelow") now argues here, on the same operative facts, that certiorari should be denied because the case may be found to be moot by the District Court.[3] Additionally, while claiming mootness here, Bigelow simultaneously claims below that, having "substantially prevailed" in the Second Circuit, it will seek on remand to impose injunctive obligations and substantive legal fees upon Petitioners. See Petition, n.18 at p. 17.

No. B-82-56 (D. Conn. July 10, 1989) (LEXIS, Genfed library, Dist. file), at p. 4, a postmerger market share of 55% was held sufficient to do away with proof of likely antitrust injury, and a postmerger market share of 48.8% was stated to be similarly sufficient. The *Remington* court initially granted summary judgment to the defendant based on *Cargill* but reversed itself following the decision of the Second Circuit in this case.

[3] Prior to the decision of the Second Circuit, Lipton and Kraft advised the Second Circuit that the proposed sale of Celestial Seasonings, Inc. ("Celestial") by Kraft to Lipton had been abandoned; that Kraft had sold Celestial to another corporation; and that Lipton had no present intention of acquiring Celestial from its new owner. The post-remand discovery on mootness, mentioned in the Petition at p. 17 n.17, has elicited no new operative facts.

Petitioners oppose Bigelow's claims for injunctive relief and legal fees.

This controversy, then, remains very much alive.

The Second Circuit decision, in which Bigelow presses its claims for injunctive relief and legal fees, is now the law of the case. It will remain so unless reversed or vacated by the Court. If, as we contend, the Second Circuit's decision is wrong, and if Bigelow has failed to establish antitrust standing as required by *Cargill*, then Bigelow will have no basis for seeking injunctive relief and legal fees. Petitioners therefore have a "legally cognizable interest" in seeking review of the Second Circuit's antitrust injury holding, upon which Bigelow's prayers for injunctive and other relief are based. *Powell* v. *McCormack*, 395 U.S. 486, 496 (1969). The practical consequences of denying review remain both real and considerable to Petitioners, and the case remains justiciable. *Local No. 82* v. *Crowley*, 467 U.S. 526, 536, n.11 (1984); *Carafas* v. *LaVallee*, 391 U.S. 234 (1968); *but see Friends of Keeseville, Inc.* v. *FERC*, 859 F.2d 230, 233 n.7 (D.C. Cir. 1988).

The Second Circuit below found "a significant public interest involved in having the legality of practices challenged in this case finally decided, *see United States* v. *W.T. Grant Co.*, 345 U.S. 629, at 632 [1953]." 867 F.2d 102 at 107, Petition, p. 10a. For the reasons stated in the Petition, there is far more significant public interest involved in having this Court review the Second Circuit decision, resolve the conflict among the circuits, and reaffirm the *Cargill* rule that competitors must show Section 16 antitrust injury before they may challenge a merger under Section 7 of the Clayton Act.

We urge the Court to grant this Petition and address this Section 16 antitrust injury question along with the substantially identical Section 4 antitrust injury question in *Atlantic Richfield*. Alternatively, because the Second

Circuit decision is flatly contrary to Cargill, that decision should be summarily vacated and the District Court's grant of summary judgment to Petitioners reinstated.

Respectfully submitted,

RICHARD J. WERTHEIMER *
JAMES R. JACKSON, JR.
ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-6824
Attorneys for Petitioner Lipton

TEFFT W. SMITH
DANIEL F. ATTRIDGE
KIRKLAND & ELLIS
200 East Randolph Street
Chicago, Illinois 60601
(312) 861-2212
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